In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 975

BARNEY R. COLSON, ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 428 F. 2d 1046. The district court's findings of fact and conclusions of law are reported at 278 F. Supp. 826 (Pet. App. E).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1970 (Pet. App. B). A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on August 17, 1970 (Pet. App. C). The petition for a writ of certiorari was filed November 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

411-863—70

QUESTION PRESENTED

Whether a suit to compel the Secretary of the Interior to issue a patent to particular public lands of the United States is an unconsented suit against the United States when the Secretary, in rejecting the claim, was acting within the valid delegation of a constitutional statute.

STATEMENT

Petitioners seek to compel the Secretary of the Interior to issue patents on a designated 240 acres of public lands of the United States. They purport to exercise powers of attorney which they claim entitle them to obtain public land on behalf of holders of Indian scrip issued in the latter half of the nineteenth century. The validity of the scrip itself is not in issue. It was issued pursuant to a statute which provided that "no transfer or conveyance of any of said certificates or scrip shall be valid." Act of July 17, 1854, 10 Stat. 304 (Pet. App. J2). Petitioners acquired the scrip, together with substitute powers of attorney[1] authorizing them "to enter upon and take possession of any and all lands * * * in which * * * [the Indians are] entitled or interested, and to enter upon and take possession of any and all lands which * * * [the Indians] should thereafter acquire or become seized of" (Pet. App. E2–3).[2]

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[1] The original powers of attorney were never presented to the Secretary in connection with this claim (Pet. App. G9–10).

[2] The history of the scrip and the transactions through which it and the substitute powers of attorney came into petitioners' possession are set forth fully by the court of appeals (Pet. App. A2–5).

Petitioners' application for patents was rejected by the Secretary of the Interior after the usual administrative review process. The ground for denial was that the powers of attorney were insufficient to support the claimed scrip rights because they did not authorize petitioners to locate the lands to be acquired in the name of the scripees (Pet. App. G5–15). Petitioners then brought this suit in the district court. That court upheld the Secretary's decision that the powers of attorney did not confer upon petitioners the right to locate lands under the scrip certificates in the name of the scripees. The court further held that the powers no longer were valid because all of the original scripees were presumably dead. It reasoned that the powers of attorney were revoked by these deaths, unless they were coupled with an interest, but that they could not validly be coupled with an interest because transfer or conveyance of the scrip was prohibited. The court concluded also that the suit was against the United States, which was not a party and had not waived its sovereign immunity, and that the suit was barred by laches (Pet. App. E5–6). The court of appeals affirmed on the ground that the action was an unconsented suit against the United States and therefore barred by sovereign immunity (Pet. App. A7–9).

ARGUMENT

1. The decision of the court of appeals that the relief sought is barred by sovereign immunity is correct. There is, moreover, no genuine conflict among the circuits on this issue. Review by this Court is therefore not warranted.

This suit is essentially an action in the nature of mandamus to compel the Secretary of the Interior to issue patents to public land of the United States. It is clearly a suit in which the "defendant is asked to transfer * * * title of property which is the Government's." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 712 (Frankfurter, J., dissenting). The consent of the sovereign therefore is "a prerequisite to the grant of judicial remedies," *ibid.*, unless the Secretary's refusal to act either was "beyond [his] statutory powers * * * [or] even though within the scope of [his] authority * * * was constitutionally void." *Dugan* v. *Rank*, 372 U.S. 609, 621–622; *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Larson* v. *Domestic & Foreign Corp.*, *supra*, at 702.[a]

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[a] Petitioners seek to distinguish *Dugan*, *Malone* and *Larson* on the ground that they were "original" actions and did not arise in the context of administrative decisions. Petitioners rely on the Administrative Procedure Act as conferring a right to judicial review. Plainly, however, whether sovereign immunity prevents judicial review of government action depends not upon whether that action may be characterized as administrative, but, rather, upon the nature of the relief sought. The review provisions of the Administrative Procedure Act do not effect a waiver in all cases of the well-established doctrine of sovereign immunity. See *Blackmar* v. *Guerre*, 342 U.S. 512, 515–516. As the court held in *State of Washington* v. *Udall*, 417 F. 2d 1310 (C.A. 9), upon which petitioners heavily rely for their assertion of a conflict among circuits, "[t]he Administrative Procedure Act may * * * provide a basis for review of governmental decisions if, and only if, the immunity doctrine is not so controlling so as to bar the suit." *Id.* at 1320. There is no conflict between this case and *State of Washington* for there the court found that plaintiffs' contention was that the Secretary of the Interior was acting outside the scope of his authority. *Id.* at 1316.

The Secretary's refusal to issue patents was not within either of the exceptions to sovereign immunity. The court of appeals properly concluded that "[t]he matter of the issuance of patents was clearly within the valid statutory authority of the Secretary of the Interior" (Pet. App. A9). Petitioners' contention is essentially that the Secretary made "an erroneous judicial interpretation * * * with respect to [their] legal rights" (Pet. 11). They do not, and could not, assert that the Secretary is without power to pass on the validity of scrip, powers of attorney, and other documents claimed to invest individuals with property rights. And it has long been established that there is no jurisdiction, absent consent, where the complaint is merely that a decision is "incorrect * * * as to law or fact, if the officer making the decision was empowered to do so. * * *" *Larson* v. *Domestic & Foreign Corp., supra,* at 695.

Petitioner does not argue that the statute under which the Secretary acted is unconstitutional. He does contend that the Secretary's action takes property rights without just compensation. Even if this were true, however, it would not render the action of the Secretary void. It would, instead, entitle the petitioner to bring suit for compensation or damages against the United States. Such a suit would be within the jurisdiction of the Court of Claims, not the district court. See 28 U.S.C. 1346(a)(2), 1491; *Dugan* v. *Rank, supra,* at 611; *Armstrong* v. *United States,* 364 U.S. 40; cf. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 Harv. L. Rev. 1, 38–39.

2. The decision of the Secretary and the district court on the merits was, in any event, correct. The statute under which the scrip was issued prohibited its transfer or conveyance (Pet. App. 12). In *Midway Co.* v. *Eaton*, 183 U.S. 602, this Court held that execution of powers of attorney conferring power to "select and locate" land in the name of the holder of scrip and, subsequently, to sell the land selected, did not violate the proscription of transfer of the scrip itself. The powers of attorney here do not, however, confer the right to "select and locate" land on behalf of the holder of scrip. Rather, they confer the right "to enter upon, and take possession" of lands to which the holders of scrip are entitled.

The Secretary was not in error in holding petitioners to the literal terms of the powers of attorney. Cf. *Udall* v. *Battle Mountain Co.*, 385 F. 2d 90 (C.A. 9), certiorari denied, 390 U.S. 957. They can claim no legal or equitable interest in the scrip itself, although they claim an interest in the land selected. The scrip does not, of course, invest holders with rights to any particular portion of public land. See *Hopkins* v. *United States*, 414 F. 2d 464, 467–468 (C.A. 9); *Finch* v. *United States*, 387 F. 2d 13, 15–16, (C.A. 10), certiorari denied, 390 U.S. 1012; *Carl* v. *Udall*, 309 F. 2d 653, 656 (C.A.D.C.). There must first be selection. Since there was none here and can be none by these petitioners under a literal reading of the powers, there is simply no property which they can "enter upon and take possession" of.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

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